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# Negligence - Duty of Care - Effect of Public Carrier's Financial Capacity on Liability

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NEGLIGENCE—DUTY OF CARE—EFFECT OF PUBLIC CARRIER'S FINANCIAL CAPACITY ON LIABILITY—Plaintiff sustained injuries when she fell between defendant's subway car and a platform directly opposite the car door. The cause assigned was the pressure from the closely packed crowd of subway passengers during a rush hour which resulted in plaintiff's being "carried by the crowd" into a position of danger. Defendant had shifted extra guards to the overcrowded area. No evidence of disorderliness or gang action appeared. In an action for damages due to defendant's negligence in failing to control the crowd, *held*, for defendant. *Callaghan v. New York City Transit System*, 204 Misc. 236, 125 N.Y.S. (2d) 796 (1953).

Though dealing with a fact situation ubiquitous in negligence cases, the opinion in the principal case is unique in containing a forthright statement that defendant public carrier could not financially afford an imposition of liability for crowd action.[1] The element of foreseeability so often used to determine the presence of a duty and the various well-worn tests of legal cause were ingeniously ignored by the court.[2] The opinion is somewhat reminiscent of the classic *Ryan* case, where a New York court held a railroad not liable for damage due to fire spread from its locomotive—a liability, in the words of the court, "against which no prudence could guard, and to meet which no private fortune would be adequate."[3] It is quite apparent that any finding of duty or causation in cases involving public carriers is a product of

[1] The court recognizes a trend toward stiffening the burden of plaintiffs seeking to establish negligence on the part of subways, saying: "Doubtless the courts realize that since subways are not operated at a profit but at a heavy loss, the public welfare will not be advanced by rules of decision imposing higher and higher standards of care upon the Transit System. . . ." Principal case at 797.

[2] See the early case of Hoag v. Lake Shore & Michigan Southern R. Co., 85 Pa. 293 (1877), for a typical application of the tests of unforeseeability and intervening force to support a holding that there was no legal cause for the spread of fire from a train wreck.

[3] Ryan v. New York Central R. Co., 35 N.Y. 210 at 216 (1866).

judicial blending of such rationalizations as foreseeability, intervening cause or last clear chance, and of public policy considerations. But realism may be stifled by such a blend where the courts' legal rationalizations are stated while their policy considerations go unsaid. It may be, as Professor Ehrenzweig thinks, that a truer test of public enterprise liability for negligence lies not in the foreseeability of a harm but in its "typicality," i.e., whether "the harm was typical for its [the carrier's] activities, and thus calculable and reasonably insurable."[4] However, a public carrier's ability to insure against the results of its negligence may turn on such conflicting policy questions as whether the carrier operates at a loss and must be protected from bankruptcy or whether it should be left to spread the cost of its liability throughout the community via increased fares and taxes. Whichever rationalization, foreseeability or typicality, is used, it seems clear that filtrations of social policy in a state whose prosperity depends upon railroads will color the decisions of its courts.[5] New York cases seem to indicate a trend in the direction of nonliability of a subway for crowd injuries beyond the control of the carrier,[6] and also an inclination for reduced liability in spread-of-fire cases involving railroads.[7] Kansas, with acres of uninsured farmlands, exhibits an opposite social attitude toward railroads.[8] Notice of such contrariety in policy, when brought out into the light from the penumbral areas of a court's reasoning, may afford a much more realistic basis of explaining results in some public carrier cases than do the traditional standards and tests of duty and causation.

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[4] EHRENZWEIG, NEGLIGENCE WITHOUT FAULT 58 (1951). See also note by same author in 8 UNIV. CHI. L. REV. 729 (1941). The "typicality" test is criticized in Malone, "This Brave New World—A Review of 'Negligence without Fault,'" 25 So. CAL. L. REV. 14 at 19 (1951).

[5] Prosser, "Palsgraf Revisited," 52 MICH. L. REV. 1 at 30 (1953).

[6] See Accetta v. City of New York, 48 N.Y.S. (2d) 487 (1944); Vogeley v. City of New York, 48 N.Y.S. (2d) 487 (1944); McKinney v. New York Consol. R. Co., 230 N.Y. 194, 129 N.E. 652 (1920); Wittes v. City of New York, 265 App. Div. 810, 37 N.Y.S. (2d) 655 (1942). Cf. Allessi v. New York Rapid Transit Corp., 163 Misc. 815, 297 N.Y.S. 1011 (1937).

[7] Ryan v. New York Central R. Co., note 3 supra; Alper v. Ramsden, 113 N.Y.S. (2d) 745 (1952).

[8] This New York-Kansas variance was the subject of a well-drawn comparison in Prosser, "Palsgraf Revisited," 52 MICH. L. REV. 1 at 30 (1953). See also Atchison, T. & S. F. R. Co. v. Stanford, 12 Kan. 354 (1874).